Supreme Court, U.S.
FILED
SEP 12 2002
OFFICE OF THE CLERK

Nos. 01-1118, 01-1119

In The
Supreme Court of the United States

JOSEPH SCHEIDLER, *ET AL.*,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC. *ET AL.*,

Respondents.

OPERATION RESCUE,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC. *ET AL.*,

Respondents.

On Writs of Certiorari To The United States Court of Appeals For The Seventh Circuit

BRIEF OF EMILY LYONS IN SUPPORT OF RESPONDENTS

PAMELA L. SUMNERS*
5443 N. BROADWAY
SUITE 2-S
CHICAGO, IL 60640
(773) 271-8324
Counsel for Emily Lyons *Counsel of Record

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ABBREVIATIONS KEY

PA	Appendix of Petitioner Operation Rescue
PX	Respondent's Exhibits at Trial (Plaintiffs' Exhibits)
RA	Respondents' Appendix in the Seventh Circuit (Appendix to Plaintiffs-Appellees' Brief)
R	Record in the Seventh Circuit
T	Trial Transcript in the District Court

INTEREST OF THE *AMICA CURIAE*[1]

At 7:30 a.m. a bomb that had been placed in a potted plant outside the clinic I worked in exploded about 15 feet from where I was standing. Someone who considers himself to be pro-life murdered a police officer.

The pipe bomb contained dynamite and nails. I am often asked what my injuries were. I usually ask them, "How much time do you have?" I had first, second, and third degree burns. The trauma surgeon described it by saying that I had hundreds of wounds. He had served in Desert Storm and had seen others who had been bombed. He was shocked to see a bombing victim back in the United States.

Metal tore my left eye to the extent that it had to be removed. Metal also shot into my right eye. After several operations and months of waiting, I am able to see well enough to read a little, but my sight will

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[1] No counsel for any party had any role in authoring this brief, and no persons other than *amica curiae* and her counsel made any monetary contribution to its preparation and submission. Written consents from the parties to the filing of the *amicus* briefs in this case are on file with the Clerk of the Court. Counsel of record for *amica curiae* is a member of the Alabama bar.

> *never be like it was. My face, eye sockets, and teeth were broken, my left ear was ruptured, my right hand was mangled, a hole about the size of a fist was torn in my abdomen, exposing my intestines. Both knees were so full of nails that they had to be opened and the nails cleaned out before they would move again. The skin was torn off both shins, exposing bone and requiring skin grafts. Both bones in my lower left leg were shattered, and the doctors feared amputation of one leg. I had dozens of complete nails inside my body, and hundreds of metal fragments and other debris. The blast was so strong it shredded my clothing and blew my shoes off.*
>
> *I have had 12 operations this year*[2] *and expect many more next year. As a result, I am a trained nurse with 20 years experience who cannot write, read or stand for long periods of time.*

Speech of Emily Lyons, "*To Hell and Back*," *reprinted at www.plannedparenthood.org/political arena/violence/emily.html.*

Emily Lyons has an interest in seeing that the terrorist who caused her horrific injuries and any

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[2] 1998. Further operations followed.

confederates who aided him (criminals who received nothing other than the malevolent satisfaction of shutting down the Birmingham clinic and maiming and killing its workers) are punished, including under federal statutes. As a clinic worker and a survivor of the Birmingham clinic bombing, she is deeply troubled by Petitioners' attempts to cloak violence in the garb of protected expression and to invoke "States' Rights" to subvert individual rights. Ms. Lyons, having filed suit to prevent the suspect in the Birmingham bombing from profiting from his wrong – if he is ever caught and his guilt established – also has abiding confidence in the jury system that Petitioners and their *amici* disparage in their filings with this Court. She has an interest in vigorous prosecution against crime such as she endured and, as an Alabamian, has an interest in access to the jury process that the Alabama Attorney General has evinced reservations about in his *amicus* brief in this case.

Emily Lyons simply reported to work at the women's clinic where she had served for four years, New Woman/All Women in Birmingham, Alabama, on January 29, 1998. No one asked her if she consented to trade her eyesight or physical vitality for the privilege. Having endured the horror of that day and the horror of repeated surgeries to return to her a fraction of her former body and life before that day, she retains the courage and the belief in the rule of law to caution her fellow citizens: "Do not allow anyone or anything, be it fear or intimidation, to make you lose sight of the main goal – to provide and support a woman's right to reproductive health as they see

fit." *Id.*[3]

SUMMARY OF ARGUMENT

This case is not a judicial plebiscite on the right to peaceful protest activities or on the allocation of federal

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[3] Eric Robert Rudolph, the man that the FBI considers the murderer of Birmingham police officer Robert Sanderson and the maimer of Emily Lyons, was charged in February 1998. The Birmingham bombing capped Atlanta's trilogy of terror directed against internationalism, reproductive health service providers, and lesbians.

On Saturday, February 27, 1996, at 1:00 a.m., a caller dialed 911 from a pay phone and reported, "There's a bomb in Centennial Park. You have 30 minutes." Twenty minutes later, the military-style backpack placed under a bench in the park where an estimated 50-70,000 milled about during the Atlanta Olympics exploded. The blast killed one person and injured 100 others. *See Southeast Bomb Task Force*, FBI Home Page, http://www.fbi.gov/majcases /rudolph/rudolph1.htm. Rudolph was charged in the bombing October 14, 1998. *Id.*

The bomb at Atlanta's Sandy Springs Professional Building on January 16, 1997 used 3 1/2" pounds of 1 1/2" long flooring nails, 100 feet of twisted galvanized wire, and dynamite. The Sandy Springs Professional Building housed the Northside Family Planning Clinic. Several people were injured, including police officers. *Id.* The bomb that caused the injuries was an anti-personnel device, timed for a second explosion to harm the rescuers. Rudolph was charged in this bombing October 14, 1998. *Id.*

The Otherside Lounge, an Atlanta lesbian bar, was bombed February 21, 1997. That bomb used 6 1/2" pounds of 2" long nails, twisted galvanized wire, and between 30 to 50 half-pound sticks of dynamite. Rudolph was charged in that bombing October 14, 1998. *Id.*

versus state powers even though Petitioners and their *amici* labor mightily to transform it into one.

Contrary to Petitioners' suggestion, bombs, blockades and blitzes of women's health clinics share no kinship with protected forms of nonviolent expression epitomized by the civil rights sit-ins that are seared into our nation's conscience. The truth is that bombers, brawlers, and blitzers of women's health clinics that provide abortion services are the very antithesis of the civil rights heroes with whom Petitioners equate them. Those who plant bombs or use clubs, fists, violent blockades, or nefarious means to express their dissent from this Court's substantive due process jurisprudence are criminals who should be punished as criminals, however sincere their beliefs.

Moreover, Petitioners' suggestion that their position nurtures federalism is either such a meaningless abstraction that it is tantamount to fetishism, or is a transparent justification for a desire not to enforce the law uniformly for all Americans – and thereby to weaken a national commitment to safe, legal abortions. Architects and purveyors of violence, whether of the degree Emily Lyons endured or of the degree the jury found in this case, should be punished with the full weight of the law, including federal statutes. "States' Rights" should not be invested with talismanic properties to ward off the force of available federal law, as Congress recognized decades ago in enacting the Hobbs Act over the objections of those who cited the very States' Rights rationale urged by Petitioners today.

Finally, true to our national values, we must trust

our citizens with access to causes of action and to the courts that Petitioners and their *amici* resist. We must trust them, as litigants and as jurors, to distinguish substance from shadow and to be worthy of the sovereignty they enjoy. Anything less than respect for the rights of citizens and the powers our system confides to them is contemptuous toward the very premise of self-government.

I. VIOLENT CRIMINAL ACTIVITY IS NEITHER PROTECTED SPEECH NOR HEROIC DISSENT.

Petitioner Operation Rescue surmises that because a jury found "only" four acts of violence in the course of deliberating, its good judgment is somehow suspect; the remedies it sanctioned are, accordingly, heavy-handed, naive extensions of the federal statutes whose application is challenged here. (Pet. Operation Rescue's Br. ("OR Br.") at 3, 4 n.8.)[4] The plain fact is that the jury in this

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[4] Interestingly, Operation Rescue concedes that the same jury that found these acts of violence *rejected* any notion that liability could be imposed for speech unaccompanied by violence or violation of law, yet Operation Rescue refuses to acknowledge that this in itself demonstrates the falsity of its theorem that a jury cannot be trusted to distinguish punishable threats from protected speech. (*See* OR Br. at 5 n.10.) Certainly, the same jury that appreciated this distinction credibly demonstrated that it understood, as Alabama's Representative Hobbs did in authoring the Act that bears his name, that crime is crime, and speech is speech. (*See* 91 Cong. Rec. at 11,912) (1945) (statement of Rep. Hobbs). It is an insult to the work of that jury to preface a description of its finding of four acts or threats of violence with the word "only" – just as it would be to

case was not seduced into conflating violent, illegal activities with nonviolent expressive protest despite Petitioners' invitations. It did its job of parsing the distinction between vehemence and violence, dissent and destruction.

Operation Rescue appropriates the mantle of the Civil Rights Movement to cloak tactics never countenanced by that movement. It wears the democratic constitutionalist's robes before this Court, but only by way of camouflage. Its rhetoric is not reality.

In Operation Rescue's rhetorical world, its own description of itself in other fora as a "pro-life mafia" is recast here as a metaphor for "activism, not violence." (OR's Br. at 2 n.2.) Petitioners undeniably have a right to try to wriggle out of a metaphor that is irreconcilable with the sober, law-abiding image they hope to portray here, but such revisionism should be noted for the Orwellian feat

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trivialize the charges against Eric Rudolph with the observation that he is a suspect in "only" four bombings.

Not surprisingly, given Operation Rescue's apparent disdain for the workings of the jury system, it also trivializes the subject matter of the jury's work: protecting women's constitutional right to reproductive health care without fear or intimidation. Apparently blinded to the requirements of the law by zeal, it contends, "Petitioners were not alleged to have obtained any tangible property ... or any intangible property like trademarks or stocks – but *only* to have interfered with the rights of women and the business of abortion." (OR Br. at 4) (emphasis added). In Operation Rescue's view, preventing access to health services, including through violent means, is " 'mere' interference with rights." (OR Br. at 7.) It would appear that it is this Petitioner, not the jury it impugns, that strikes a cavalier attitude toward enforcing constitutional guarantees.

that it is: "the defense of the indefensible." George Orwell, "Politics and the English Language," in *The Orwell Reader* at 363 (1984 ed., HBJ: New York).

In this rhetorical world, the Civil Rights sit-ins, the objective of which was to *secure* access to public accommodations on the same terms as white citizens, are mischaracterized as blockading whites from access to the lunch counters just as Petitioners blockaded clinic access. (OR's Br. at 26-27.) But the truth of the desegregation sit-ins cannot be revised: the protestors wanted a space at the table, not to keep other patrons from theirs. The sit-in manual commanded: "Don't strike back, or curse if attacked ... Don't block entrances." *See* Howard Sitkoff, *The Struggle for Black Equality* 67 (Harper Collins Ltd. 1993).

This Court knows the difference between seeking access and blocking it, having upheld the right "in a peaceable and orderly manner to protest by silent and reproachful presence,[5] in a place where the protestant has every right to be," *Brown v. Louisiana*, 383 U.S. 131, 142 (1966), while allowing to stand the criminal-trespass convictions of 200 students who blocked access to the jail to protest the arrest of civil rights demonstrators. *Adderly v. Florida*, 389 U.S. 39 (1966). The tactics Petitioners seek to defend call to mind not the lunch counters of Greensboro, but George Wallace blocking the doors at Tuscaloosa.

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[5] Or, it should be noted, to chant, speak, counsel or attempt to persuade, consistent with reasonable time, place and manner constraints. Threats of bodily harm are not reasonable.

Continuing in its campaign of misdirection, Petitioner Operation Rescue insists that the Seventh Circuit's construction of RICO "would make a racketeer out of Martin Luther King, Jr." (OR Br. at 7.) Gandhi, too, would be an extortionist. (OR Br. at 44.) [6] "Social protest," it reminds us, "has a long and revered history in this nation." (OR Br. at 28.)

Violence, too, has a long history in this nation, although what we revere, and what has sustained us, is our fidelity to the rule of law that punishes it. Contrary to Operation Rescue's insinuation, it is not "social protest" that we punish when we punish violence. Social protest does not mangle bodies. Gandhi had no gunpowder.

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[6] This is not a novel form of argument. In floor debates on the Hobbs Act, some representatives (who also objected to passage based on States' Rights) conjured a parade of horribles about the Act's alleged chilling effect on legitimate protest activities. Representative Celler predicted that union strikes, labor picketing, hurling the "scab" epithet, and even the collective bargaining process itself would fall within the Act's definition of "violence" or "force." (91 Cong. Rec. at 11,901)(statement of Rep. Celler)(1945). He predicted that anyone who voted at a union meeting to strike would meet federal felony charges; indeed, he predicted that union members could be found to have "conspired" to commit the "felony" of exercising their legally protected labor rights. (*Id.* at 11,902).

Such use of the propagandist's tool was rebuked by Representative Fellows of Maine, who wryly observed of similar rhetorical excesses, "In common law pleading we would call that something akin to a departure. I allege that a man has converted to his own use my horse and he replies that his grandmother is a fine woman." (91 Cong. Rec. at 11,907) (statement of Rep. Fellows) (1945).

Martin Luther King, Jr. did not block white citizens from exercising the franchise by burning the voting booth or forcing them to run a gauntlet of angry African-Americans hurling threats or fists at them. Fifty-lb. sticks of dynamite, galvanized nails, and anti-personnel backup bombs are not political tracts.

The rhetorical sleights-of-hand that characterize Operation Rescue's image-sculpting provide insight into why it chose to compare the violent persons in its ranks to those peaceful protestors who marched over Selma's Edmund Pettus Bridge. Operation Rescue is two-faced Janus, woundedly protesting its moderation here while presenting quite another face to the troops. Clinic invasions and blockades, initially characterized for insiders as martial "blitzes" at "abortuaries" were revised into Clara Bartonesque "rescues" for public and judicial consumption. (*See* PX797B, 801 at 13-14; 1303, T1018.) When the public relations antennae were more relaxed, however, PLAN members continued to justify bombings as "necessary defense." (*See* PX713.) Tellingly, Petitioner Scheidler, posing in front of a burned-out clinic, described the photograph as a "great scene." (PX719.)

In this Court, Petitioners may liken themselves to the heroes of this nation's epic nonviolent struggle for an end to racial disenfranchisement, but elsewhere, unretouched by the revisionist brush, Petitioner Scheidler scorns as spineless those ideological compatriots who condemn violence as a means to ending legal abortion. (*See* PA217; T1511-12, 3936, 4144, PX801 at 13.) Elsewhere, he has spoken of his "virtual army" for whom "the abortion clinic door means nothing," and has advised

doctors who might view his public threats as exactly what they are to flee to the mountains. (PX801 at 19; PA211.)

These words match the tactics of PLAN conspirators in their virulence. Self-evidently they bear no resemblance to the words or deeds of the Reverend King. Nor can they be reconciled with the image of the champions of robust public debate that PLAN participants project here.

Those who "express" their protest of abortion with fists, projectiles, and bombs do not stand in any venerated first amendment tradition. They are in fact criminals, despite Petitioners' apologia for them. (*See* OR Br. at 28 (lamenting that Seventh Circuit's opinion treats those who express dissent through violence as criminals); Pet. Scheidler's Br. at 15 (objecting to prison sentences for Hobbs Act violations).)

Presumably, in Petitioners' view, the purity of the criminal's commitment to his principles means that his deeds should go unpunished. Punishing crime regardless of the actor's motivations, it warns, would snare what popular understanding would brand as "politically correct" activists, too, such as animal-rights or anti-nuclear activists. (*See* OR Br. at 44; Scheidler Br. at 35.) The contention about animal-rights and anti-nuclear activists is among the few unassailably true statements in Operation Rescue's brief.

To the extent that, as Operation Rescue speculates, PETA or anti-nuclear activists acquire dynamite or bombs and plan to use them to demonstrate their disdain for furriers or power plants, they should be treated as criminals regardless of their views about the morality of animal

vivisection or global ecology. (*See* OR Br. at 44.) Any deviation from the neutral enforcement of laws punishing terroristic acts because of sympathy with the actor's viewpoint does violence to the rule of law.

That evenhandedness is a good thing on which the integrity of our legal system depends, that we cannot elect to punish some terrorists because we appreciate their sincerity while we would punish others, appears to have eluded Petitioners. What is good for PETA is good for Operation Rescue, or, as the sponsor of the Hobbs Act put it, "Crime is crime, no matter who commits it." (91 Cong. Rec. at 11,912) (statement of Rep. Hobbs) (1945).

II. PUNISHING CRIME EFFICIENTLY AND UNIFORMLY IS NOT A STATES' RIGHTS ISSUE.

The search for Eric Robert Rudolph in connection with the Birmingham clinic bombing was federalized. In mid-July 1998, Rudolph was seen in the wilds of North Carolina's Nantahala National Forest. In the small mountain town of Andrews, where residue of explosives was found in a vacant house in which Rudolph is believed to have hidden, residents were divided over whether he should be considered an outlaw or the hero in a struggle with federal authorities. *See Carol Robertson, "Dog Sniffs Trace of Explosives in Vacant Home," The Birmingham News at 1 (July 18, 1998); "Town Divided over Eric Rudolph: Some in Andrews Say They Would Not Turn the Bombing Suspect in,"* The Associated Press (Jul. 19, 1998). Some clergy urged parishioners to volunteer

information to the authorities, while others stated that they would not condemn any local citizens who helped the bombing suspect to evade federal capture. *Rachel Zoll, "Clergy Split over Fugitive,"* The Associated Press (Jul. 21, 1998).

That a person suspected of using bombs rather than tracts as his vehicle for "expression" should have assumed the status of a valiant warrior against federal power is one among many perverse entries in the States' Rights lexicon. That half the residents of Andrews should consider resistance to all things federal a justification for harboring a bombing suspect demonstrates the enduring cleavage between "Nation" and its constituent parts. That cleavage has been cynically exploited in Petitioners' filings in this Court.

Whatever the theoretical or genuine governance virtues of American federalism, the State's Rights mantra invoked by Petitioners and their *amici* is a *non sequitur* when uttered in opposition to the Hobbs Act or to the constitutional right to choose to have an abortion. (*See* Pet. Scheidler Br. at 33-34; OR Br. at 47-48; Br. of *Amici* General Pryor *et al.* at 10, 17.)

Congress considered and rejected ostensible federalism concerns when it passed the Hobbs Act. The Hobbs Act was authored by an Alabamian and shepherded through floor debates by a Texan who noted trenchantly that picking the side of criminals was a poor choice for making a stand for States' Rights. (91 Cong. Rec. at 11,910) (statement of Rep. Sumners). A Tennessean reminded his colleagues that some subjects of congressional notice were properly noticed. (91 Cong.

Rec. at 11,911) (statement of Rep. Jennings).

Then, as in this Court today, "States' Rights" was deployed as a tool of misdirection. A review of the legislative history demonstrates that the same disingenuous polemic was at work in the 1945 floor debates as in this Court today.

Representative Welch vigorously and explicitly accused Hobbs Act supporters of being anti-States' Rights:

> This proposed law is an acknowledgment by its proponents that law and order has broken down in the sections of this country they represent. Is it true that the very people who elect them to Congress to make laws also elect State, county, and city law enforcement officers who are weaklings who fail in their duty to enforce laws? Do they elect judges who fail in their duty to impose proper penalties for law violation?

91 Cong. Rec. at 11,903 (statement of Rep. Welch).

A belief in the rule of law and in the efficacy of the national government to legislate on matters of national scope prevailed over the views of Representative Welch and his allies. The States Rights mantra, though chanted copiously, was rejected in favor of the need to protect American citizens from criminals in uniform fashion: "[T]his bill applies to every citizen under the American flag, whoever he may be, wherever he may live or to whatever organization he may belong. ... Our people must be made secure by law. They are entitled to that

protection–we must not fail them." (91 Cong. Rec. at 11,911) (statement of Rep. Springer).

In the end, Congress legislated based on its recognition that crime is crime, and citizens are entitled to protection from it.

III. OUR SYSTEM DEMANDS THAT WE TRUST OUR CITIZENS WITH ACCESS TO THE COURTS AND AS JURORS.

In enacting the Hobbs Act, Congress rejected hyperbolic fulminations of precisely the sort pressed here. Petitioners and their *amici* urge this Court to embrace their self-serving conjectures of dire consequences if this Court does not act swiftly to slam the door on private actions under RICO predicated on violations of the Hobbs Act. Their inapposite and exaggerated speculations are eerily similar to those rejected by Congress in its debates on the Hobbs Act decades ago. History has demonstrated that the passage of the Hobbs Act has not chilled the exercise of free speech, even hateful or loathsome speech protected under the first amendment.

As noted, Petitioners have purportedly conjured their specters for the sake of unchilled speech, unfettered dissent, or a mere reflex toward "federalism" regardless of whether the Hobbs Act or RICO as applied to violent activity has any actual implication for peaceable free expression, the systemic allocation of power, the structural integrity of government, or the fostering of democracy that federalism is intended to promote. It is jarring, then, to discover that the subtext of these arguments – all about

values which putatively enhance the rights of *individual citizens* – is a profound distrust of those same individual citizens.

The jaundiced eye with which Petitioner Operation Rescue views the ability of any jury to sift free speech from threats and violence has been noted already. It is perhaps less than surprising that an adversary which sought to confuse sticks and stones with mere words in hopes of bamboozling a jury would resent that the jury was not credulous enough to succumb to such obfuscations.[7] But it is startling that a few chief law enforcement officers of states – even if only a handful of states – apparently believe that punishing governmental actors for wrongdoing is poor social policy.

The brief of *amici* General Pryor *et al.* objects to allowing a RICO cause of action against state officials who conspire to break the law, who have a pattern of breaking the law. Allowing citizens to state a cause of action against habitual violators of citizens' rights is portrayed as

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[7] Operation Rescue reasons that RICO remedies are best confided to the Attorney General of the United States because "private parties do not have the political accountability, or the duty to exercise prosecutorial discretion, that apply to the federal government." (OR Br. at 24.) Private parties cannot be trusted to refrain from "waging political or commercial warfare against [their] adversaries." (*Id.*) Operation Rescue fails to appreciate that political actors have political motivations, that elections herald vicissitudes in law-enforcement priorities that may foreclose individually aggrieved citizens from vindicating their rights, and that the "warfare" waged here was waged by PLAN – a warfare that private parties and a jury resolved through the peaceful process of court action.

persecution of public servants that interferes with the efficient discharge of their duties. (*See* Br. of *Amici* General Pryor *et al.* at 12 & n.6.) No disclaimer is offered for civil rights suits, no recognition that meritless suits are judicially euthanized early is made.

Behind the professed solicitude for efficient government unmolested by the governed is suspicion of ordinary citizens' motives. It is an odd thing that purported champions of rights that attach to citizens and not to governments–rights of dissent and free speech[8] – mistrust the ability of law-abiding citizens to go about their civic business of bringing or impartially determining suits based on existing law. It is decidedly odd that the chief law enforcement officer of any state would agitate for *fewer* protections for citizens and *less* punishment for lawbreakers. This is particularly striking in view of the fact that effective law enforcement, including the realistic prospect of being caught and punished, has been proven to decrease crime at women's health clinics that perform abortions. *See 2000 National Clinic Violence Survey Report* (Feminist Majority Foundation) (released Jan. 22, 2001), available at http://www.feminist.org/research/cvsurveys/clinic_survey2000.pdf17, *at 5.*[9]

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[8] *See* Br. of *Amici* General Pryor *et al.* at 7 ("The application of civil RICO to political or social protest activities has a substantial chilling effect on protected First Amendment activity. Adding injunctive remedies to the powerful treble damages available under civil RICO would only lower the temperature further.")

[9] The survey defined violence as: blockades, invasions, bombings, arsons, chemical attacks, stalking, physical assaults,

Just as Petitioners insist that juries cannot competently distinguish protest from projectiles, *amici* Attorneys General invite the Court to "imagine" a citizenry lured by RICO's treble-damages provision to sue about administrative and regulatory decisions. (Br of *Amici* Pryor *et al.* at 11-12.) As an aid to the exercise of imagination, they point to suits about no-smoking ordinances. (*Id.*) Not one of the suits they cite, however, is based on a RICO or Hobbs Act cause of action; every one of them is based on the law of a particular state.[10]

Nonetheless, having picked a wildly inapposite example to illustrate the imaginary point, *amici* argue that

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gunfire, bomb threats, death threats, and arson threats. *2000 National Clinic Violence Survey Report* at 5. The survey report specifically identifies as among the deterrence components of "effective" law enforcement the enactment of the Freedom of Access to Clinic Entrances (FACE), this Court's decision in *Madsen v. Women's Health Center*, 512 U.S. 753 (1994), and this Court's earlier decision in this very case. *Id.*

The correlation between violence and weak enforcement is apparent in this case, as Respondents note in their citations to various materials of record. (*See, e.g.*, T3938, 4815-16; PA 123.) Even with a decrease in violence from 1994-97 levels, 20% of clinics continue to experience the violence documented by the survey. (*Id.*)

[10] Perhaps realizing that the example does not illustrate the hypothetical danger of a bloated RICO because none of the cases is in fact a RICO or Hobbs Act case, *amici* concede that if any of them were, the Hobbs Act's *mens rea* element would defeat the cause of action. (*See* Br. of *Amici* Pryor *et al.* at 12.) Thus, *amici* admit in their own brief that they have raised a wholly spurious issue; while the perils of secondhand smoke may be many, they do not include liability under RICO.

the availability of damages under the federal statutes exposes public officials to liability for the "lawful exercise of their discretionary functions." (Br. of *Amici* Pryor *et al.* at 12.) They imagine RICO liability for zoning actions, permit actions, environmental regulations "and so on" (*id.*), even while they concede that their imaginary liability is imaginary precisely because the *mens rea* and qualified immunity defenses would negate liability. (*Id.*) They do not mention the dispositive defenses of legislative immunity, the political-question doctrine, and other defenses and sole remedies that may attach to regulatory and administrative actions.

Since *amici* recognize that in fact RICO or Hobbs Act liability cannot exist for no-smoking ordinances, zoning, environmental, or administrative rules (conceded by *Amici* Pryor *et al.* at 12), it must be that the false example cloaks the true concern. The true concern involves those citizens who present cases of official malfeasance compelling enough to move the near-Sisyphean obstacles of the various immunity doctrines. Such cases that get to a jury and rightly prevail, apparently viewed as nuisances, are euphemistically described as those in which "defenses were unsuccessful." (*Id.* at 12.) A desire by attorneys general to protect wrongdoers on the public payroll can only be regarded as contemptuous toward citizens.

These same sentiments about the costs of litigation and the potential exposure of the public fisc for public agents' serious wrongdoing could be expressed about the civil rights laws to which our citizens and our judiciary are rightly committed. Liability exists under those laws, as

well, and the state must invest in defense of them. It would be impolitic, however, for *amici* to question in this forum why an African-American might have recourse to monetary damages, and even to multiple civil rights causes of action if his rights are violated by his government. Allowing a civil rights cause of action at all hazards liability, and providing for multiple causes of action no doubt lengthens a trial and increases expense.[11] Such an argument, given the pains our nation and its citizens endured to secure those legal protections, would shock and shame us.

Amici's objection to the fact that government is obliged to defend against lawsuits by citizens attempting to vindicate their rights simply cannot be satisfied in a democratic polity or in a polity that values civil rights. The only failsafe way to accommodate General Pryor *et al.*'s discomfort with citizen suits against government, whether about zoning decisions or police officers' billyclubs, is to decree sovereign immunity. If the king can do no wrong, it does not matter whether his wrong was negligent, stupid, or malicious. Citizens would have no opportunity to test whether their servants were entitled to discretionary function or qualified immunity, and juries to determine state liability would be superfluous.

This Court has addressed the limitations of sovereign immunity many times precisely because our government is not a monarchy. Our president, senators,

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[11] *E.g.*, 42 U.S.C.§ 1981; 42 U.S.C.§ 1983; 42 U.S.C.§ 1985. These statutes are a mere starting point for causes of action under which an aggrieved African-American might sue his government.

city councilors, wardens, bureaucrats, and police officers sometimes commit grievous wrongs proscribed by both federal and state law. When they do, the sovereign people may sue and punish them, exacting the penalty through the decree of a jury of their peers.

Unlike Petitioners and their *amici*, our Founders trusted citizens more than they trusted government. That is why we have the first amendment that Petitioners and their *amici* purport to champion and why we allow ordinary citizens access to the courts that Petitioners and their *amici* wish to block. It is also why we have juries, who in addition to being clever enough to separate legal fact from legal fiction in cases like this one, often act as a brake on prosecutorial zeal and as the instrument of calibration in matching the wrong to the punishment. Petitioners and their *amici* repeatedly disparage the truly indispensable element of our democracy: the sovereign people. They do not trust them even though Publius did.

People are imperfect, and our democracy is imperfect. But our democratic vision cannot be perfected by withdrawing judgment from the people or retracting their rights in order to repose them in their governors. This realization has served us well since the founding of the Republic, and neither Petitioners nor their *amici* have made any credible argument for why we should forsake our bedrock principles merely because democracy may be messy, expensive, and far more time-consuming than monarchy.

CONCLUSION

Petitioners and their *amici* urge this Court to accept a parade of horribles they have manufactured of whole cloth, ostensibly for the sake of unchilled "speech," for the sake of "federalism," for the sake of efficient government. "Speech" turns out to be a handy cloak for violent action, "federalism" nothing more than a ritualistic invocation of a word divorced from a concept as though its mere utterance demands Pavlovian obedience, efficiency a subterfuge for depriving citizens of the tools for bringing governmental power to heel. While Petitioners and their *amici* profess solicitude for the rights of citizens to exercise their right to free speech, they evince a surprising lack of confidence in the ability of those same citizens to judge impartially the unsubtle difference between speech and thuggery, protest and projectiles.

Congress understood that defense of the indefensible is a poor vehicle for championing free-speech values, just as picking the side of criminals is a poor way of making a stand for States' Rights. Petitioners and their *amici* should be reminded of this.

Respectfully submitted,

PAMELA L. SUMNERS
COUNSEL OF RECORD
5443 N. BROADWAY • SUITE 2-S
CHICAGO, IL 60640
(773) 271-8324
COUNSEL FOR AMICA CURIAE EMILY LYONS